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No. 03-1060

In The

Supreme Court of the United States

PATRICIA WILLIAMS, TERRI L. WATKINS,

Petitioners,

v.

GALVESTON INDEPENDENT SCHOOL DISTRICT,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

ANTHONY P. GRIFFIN
Counsel of Record

DEBORA L. PERKEY
ANTHONY P. GRIFFIN, INC.
Lawyers
1115 Moody
Galveston, Texas 77550
409.763.0386
1.800.750.5034
Facsimile No. 409.763.4102

Counsel for Petitioners Patricia Williams and Terri L. Watkins

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Question Number One: Whether the Fifth Circuit standard to establish a prima facie wage discrimination case under the civil rights statutes is in effect the more restrictive standard under the Equal Pay Act and therefore runs afoul of *County of Washington v. Gunther*, 452 U.S. 161, 101 S.Ct. 2242, 68 L.Ed.2d 751 (1981).

Question Number Two: As there is no definitive standard as to what constitutes a prima facie case of discrimination pursuant to the civil rights statutes in the wage discrimination context, whether this leads to inconsistent and unjust results throughout the Circuit Courts of Appeals, and as such should be addressed by this Court.

PARTIES TO THE PROCEEDING

Petitioners

Patricia Williams, an individual citizen of the United States, residing in the Southern District of Texas, is a Petitioner before this Court. Dr. Williams has no corporate affiliations. Patricia Williams was a Plaintiff in the United States District Court and an Appellant before the Fifth Circuit Court of Appeals.

Terri L. Watkins, an individual citizen of the United States, residing in the Southern District of Texas, is also a Petitioner before this Court. Ms. Watkins has no corporate affiliations. Terri L. Watkins was a Plaintiff in the United States District Court and an Appellant before the Fifth Circuit Court of Appeals.

Respondent

Galveston Independent School District (GISD) is an employer as that term is defined in employment law and a school district incorporated under the laws of the State of Texas. Petitioner is unaware of any corporate affiliations of Respondent. GISD was the Defendant in the United States District Court, and Appellee before the Fifth Circuit Court of Appeals.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	2
Statement of the Case	2
Reasons for Granting the Writ	8
Question Number One	8

Question Number One: Whether the Fifth Circuit standard to establish a prima facie wage discrimination case under the civil rights statutes is in effect the more restrictive standard under the Equal Pay Act and therefore runs afoul of *County of Washington v. Gunther*, 452 U.S. 161, 101 S.Ct. 2242, 68 L.Ed.2d 751 (1981).

Question Number Two	14

Question Number Two: As there is no definitive standard as to what constitutes a prima facie case of discrimination in the wage discrimination context, whether this leads to inconsistent and unjust results throughout the Circuit Courts of Appeals, and as such should be addressed by this Court.

Conclusion	18

TABLE OF AUTHORITIES

Page

CASES

Aman v. Cort Furniture Rental Corp., 85 F.3d 1074 (3d Cir. 1996) 16

Amro v. Boeing Co., 232 F.3d 790 (10th Cir. 2000) 15

Anderson v. Zubieta, 180 F.3d 329 (D.C.Cir. 1999) 16

Austin v. Ford Models, Inc., 149 F.3d 148 (2d Cir. 1998) 15

Buettner v. Arch Coal Sales Co., Inc., 216 F.3d 707 (8th Cir. 2000), cert. denied, 531 U.S. 1077, 121 S.Ct. 773, 148 L.Ed.2d 672 (2001) 16, 17

Coleman v. Wayne State Univ., 664 F.Supp. 1082 (E.D. Mich. 1987) 14

County of Washington v. Gunther, 452 U.S. 161, 101 S.Ct. 2242, 68 L.Ed.2d 751 (1981) ..... *passim*

Cullen v. Ind. Univ. Bd. of Trs., 338 F.3d 69 (7th Cir. 2003) 7

E.E.O.C. v. Sears, Roebuck & Co., 839 F.2d 302 (7th Cir. 1988) 12

Foster v. Arcata Associates, Inc., 772 F.2d 1453 (9th Cir. 1985) 12

Furnco Construction Corp. v. Waters, 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978) 14

Johnson v. Univ. of Wis. – Eau Claire, 70 F.3d 469 (7th Cir. 1995) 15

Lees v. Case-Hoyt Corp., 779 F.Supp. 717 (W.D.N.Y. 1991) 13

Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978) 10, 11

TABLE OF AUTHORITIES – Continued

Page

McGuinness v. Lincoln Hall, 263 F.3d 49 (2d Cir. 2001) 13

McKee v. Bi-State Development Agency, 801 F.2d 1014 (8th Cir. 1986) 12

Meeks v. Computer Assocs. Int'l, 15 F.3d 1013 (11th Cir. 1994) 15

Merrill v. Southern Methodist Univ., 806 F.2d 600 (5th Cir. 1986) 12, 13

Orahood v. Board of Trustees, 645 F.2d 651 (8th Cir. 1981) 16

Pittman v. Hattiesburg Mun. Separate Sch. Dist., 644 F.2d 1071 (5th Cir. Unit A May 1981) 6

Plemer v. Parsons-Gilbane, 713 F.2d 1127 (5th Cir. 1983) 11, 12, 13

Tenkku v. Normandy Bank, 348 F.3d 737 (8th Cir. 2003) 17

Uviedo v. Steves Sash & Door Co., 738 F.2d 1425 (5th Cir. 1984) ..... *passim*

Walton v. Cowin Equipment Co., Inc., 774 F.Supp. 1343 (W.D. Ala. 1991), aff'd, 974 F.2d 1348 (11th Cir. 1992) 13

Williams v. Galveston Indep. Sch. Dist., 256 F.Supp.2d 668 (S.D. Tex. 2003) 1

Williams v. Galveston Indep. Sch. Dist., 78 Fed.Appx. 946 (5th Cir. October 23, 2003) 1

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND REGULATIONS

29 C.F.R. § 1620.13(b)(2) 17

28 U.S.C. § 1254(1) 1

29 U.S.C. § 206(d) (1998) 10

42 U.S.C. § 1981 ..... *passim*

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a Writ of Certiorari to review the judgment of the Fifth Circuit Court of Appeals.

OPINIONS BELOW

The opinion of the United States Court of Appeals, Fifth Circuit (Appendix A at App.1), was decided upon summary calendar and is not reported. *Williams v. Galveston Indep. Sch. Dist.*, 78 Fed.Appx. 946, No. 03-40436 (5th Cir. October 23, 2003).

The opinion of the United States District Court for the Southern District of Texas, Galveston Division, No. G-02-236 (Appendix B at App.10) is reported. *Williams v. Galveston Indep. Sch. Dist.*, 256 F.Supp.2d 668 (S.D. Tex. 2003).

STATEMENT OF JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on October 23, 2003. No motion for rehearing was filed. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves 42 U.S.C. § 1981, Equal Rights under the Law:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981(a).

STATEMENT OF THE CASE

On April 5, 2002, Dr. Patricia Williams filed suit in federal district court against Galveston Independent School District (GISD) pursuant to 42 U.S.C. § 1981 alleging disparate treatment (wage discrimination) based on race in the employment setting. On August 13, 2002, Terri Watkins joined the lawsuit as an additional plaintiff.

Dr. Williams and Ms. Watkins challenged the disparity of pay among those employees of GISD classified as Administrative Level Pay Grade 8, the highest pay grade among GISD administrators excluding the Superintendent. At the time of the filing of this lawsuit, there were only four (4) such positions classified as Administrative Level Pay Grade 8. Those positions were: Executive Director of Employee & Community Relations occupied by Petitioner Dr. Patricia Williams, an African-American

female (*see* Appendix C at App.29), Executive Director of Human Resources occupied by Petitioner Terri Watkins, an African-American female (*see* Appendix D at App.33), Chief Financial Officer occupied by Paul McLarty, a White male (*see* Appendix E at App.37), and Assistant Superintendent of Curriculum and Instruction occupied by E.J. Garcia, a White female (*see* Appendix F at App.42).

Dr. Williams' position, Executive Director of Employee and Community Relations, was created after GISD received criticism from the Texas Comptroller of Public Accounts that teachers, administrators and parents felt that the district was not responsive in context of employee and community relations. Dr. Williams was directed into this position by the Superintendent for GISD, with the Superintendent's assurance that Dr. Williams' salary and job responsibilities would remain commensurate with Ms. Garcia. Dr. Williams' and Ms. Garcia's salaries had been identical for the previous five to six years.

The salaries of the four Pay Grade 8 positions for the 1999 to 2002 school years were as follows:

	Garcia	**Williams**	**McLarty**	**Watkins**
99-00	$72,630	$72,630	$73,000	$ _____
00-01	$83,440	$75,129	$82,686	$71,648
01-02	$94,249	$77,630	$92,499	$76,673
02-03	$94,249	$77,630	$92,499	$76,673

The four positions at issue here were the top administrative positions in the district, excluding the Superintendent. Obviously, each position was unique to GISD and the exact duties of each position were not the same (*compare* Appendix C through Appendix F). However, the positions were comparable in that they required the same level of

skill, responsibility and decisionmaking. Each involved top-level planning and strategy, representing the district at the highest levels, recommending and revising district-wide policies, participating in district-level decisionmaking, and providing leadership.

The comparables for Dr. Williams were E.J. Garcia and Paul McLarty. Ms. Garcia and Dr. Williams both entered Pay Grade 8 in the 1995-1996 school year and both possessed roughly the same experience with the district (approximately 30 years). Mr. McLarty entered Pay Grade 8 in 1999-2000. However, Dr. Williams' experience and training exceeded that of Mr. McLarty.

Patricia Williams was the only Pay Grade 8 administrator with a doctoral degree. She also had greater certifications than other Pay Grade 8 administrators. She had a long and successful background in education; Mr. McLarty had no prior experience in education.

Dr. Williams' position required a master's degree in educational administration; Texas mid-management, PDAS and ILT certification, and at least five years experience in school administration (*see* Appendix C at App.29). Ms. Garcia's position required a master's degree in educational administration, Texas mid-management or other appropriate Texas certificates, and at least three years experience as a classroom teacher and five years experience in campus administration (lesser qualifications than Williams) (*see* Appendix F at App.42). And while Dr. Williams had only one subordinate, the level of responsibility is not necessarily tied to the number of employees one supervises; for example, the Superintendent for GISD directly supervised a very small number of employees.

The comparable with respect to Petitioner Watkins was Paul McLarty. Mr. McLarty and Ms. Watkins both entered Pay Grade 8 in 1999-2000. The requirements for Mr. McLarty's position and Ms. Watkins' position were similar (*compare* Appendix D with Appendix F), yet GISD paid Mr. McLarty significantly more than Ms. Watkins. Furthermore, as Mr. McLarty did not hold the credentials to be an Assistant Superintendent for Business (midmanagement certification); the position of Chief Financial Officer was created for him.

It is important to note that the evidence of wage discrimination is not limited to the large disparity of pay between the African-American Pay Grade 8 employees and that of the White Pay Grade 8 employees. A study conducted for GISD concluded that GISD had not adjusted the salary structure since 1999 with the only exceptions being Ms. Garcia and Mr. McLarty. The author of the study testified that with respect to Pay Grade 8 positions, there was no formula in effect with respect to salaries and no procedure to assure equality within the position. Furthermore, GISD paid Ms. Garcia and Mr. McLarty (White position holders) at salary rates that were inconsistent with GISD's own policies as well as the Texas Association of School Board (TASB) Personnel Policies. And the pay structure for Pay Grade 8 positions was not uniform in design and administration, in violation of TASB/GISD policy requiring pay commensurate with district/education experience. Here, the only employees who were paid at the highest end of the pay grade were White employees; the only employees who were paid at the lowest end of the pay grade were African-American employees. African-American employees with more experience were paid at the lowest end of the pay grade.

On December 13, 2002, GISD filed their Motion for Summary Judgment to which Williams and Watkins filed their Response. By Order dated March 24, 2003, the district court granted GISD's Motion for Summary Judgment (Appendix B at App.10) and entered Final Judgment disposing of all claims with respect to all parties.

Dr. Williams and Ms. Watkins appealed. The Fifth Circuit Court of Appeals affirmed finding, "Appellants have failed to adduce any evidence showing that they have substantially the same responsibility as purportedly comparable employees." (Appendix A at App.8).

In affirming, the Fifth Circuit relied on the following standard:

> To establish a *prima facie* case of discriminatory compensation, a plaintiff must prove "that (1) she is a member of a protected class; and (2) that she is paid less than a nonmember for work requiring substantially the same responsibility." *Uviedo v. Steves Sash & Door Co.*, 738 F.2d 1425, 1431 (5th Cir. 1984); *see also Pittman v. Hattiesburg Mun. Separate Sch. Dist.*, 644 F.2d 1071, 1074 (5th Cir. Unit A May 1981).

Appendix A at App.5.

However, in determining whether two jobs require substantially the same responsibility, the court essentially adopted a strict interpretation of comparables, analogous to that set forth under the Equal Pay Act:

> In considering whether two jobs require substantially the same responsibility, we have looked to the job's duties, *see Uviedo*, 738 F.2d at 1431; *Pittman*, 644 F.2d at 1074, including the jobs' relative supervisory authority and responsibility

> for revenue, *see Cullen v. Ind. Univ. Bd. of Trs.*, 338 F.3d 693, 700 (7th Cir. 2003).

Appendix A at App.5-6.[1]

Under this strict analysis, the court relied heavily on the job descriptions, the budget that each administrator oversaw and the supervisory responsibilities of each position. The court found:

> These descriptions demonstrate that the four grade 8 positions differ in many respects. Not only are their responsibilities dissimilar in substance, but the scope of their authority over GISD funds and employees differs. These four employees do not have "substantially the same responsibility," *Uviedo*, 738 F.2d at 1431.

Appendix A at App.7.

The court disregarded all other factors: "In evaluating a claim of discriminatory compensation, we do not attempt to evaluate the importance of an employee's role in her organization." "[Qualifications and experience] are likewise irrelevant when, as in this case, similarly qualified persons have taken dissimilar jobs." (Appendix A at App.8). The court also disregarded evidence as to how Dr. Williams was steered into the position and the Superintendent's promise that she would remain on par with Ms. Garcia:

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[1] That portion of the *Cullen* decision cited by the Fifth Circuit addresses the standard under the Equal Pay Act, not under the civil rights statutes.

> Dr. Williams suggests that Superintendent Boening steered her into her current position as Executive Director of Employee and Community Relations and away from Assistant Superintendent of Curriculum and Instruction, which eventually became a higher-paying job. This allegation cannot save her claim for *discriminatory compensation,* which requires that the plaintiff's job require substantially the same responsibility as a higher-paid employees job. *See Uviedo v. Steves Sash & Door Co.,* 738 F.2d 1425, 1431 (5th Cir. 1984).

Appendix A at App.5, n.6.

Based on this narrow analysis, the Fifth Circuit concluded, "the four positions presented here are too dissimilar to facilitate comparison." (Appendix A at App.8, n.11).

REASONS FOR GRANTING THE WRIT

Question Number One: Whether the Fifth Circuit standard to establish a prima facie wage discrimination case under the civil rights statutes is in effect the more restrictive standard under the Equal Pay Act and therefore runs afoul of *County of Washington v. Gunther*, 452 U.S. 161, 101 S.Ct. 2242, 68 L.Ed.2d 751 (1981).

The Fifth Circuit erred in its narrow focus of what evidence it considered in determining whether Petitioners established a prima facie wage discrimination case brought under 42 U.S.C. § 1981. The court in effect required Petitioners to meet a restrictive definition of the "equal work" standard, contrary to *County of Washington*

v. Gunther, 452 U.S. 161, 101 S.Ct. 2242, 68 L.Ed.2d 751 (1981).

In *Gunther*, this Court held that an individual may bring a claim for gender-based wage discrimination under Title VII even though no member of the opposite sex holds an equal but higher paying job (provided the challenged wage rate is not exempted under the Equal Pay Act's affirmative defenses). This Court indicated that a plaintiff holding a unique position within a company could obtain legal redress under Title VII if the plaintiff proved that the employer admitted it would have paid the plaintiff more if she were a male or if the plaintiff demonstrated that "a transparently sex-biased system for wage determination" was a pretext for discrimination. *Id.* at 178-79. In rendering its decision, this Court expressly refrained from deciding "the precise contours of lawsuits challenging sex discrimination in compensation under Title VII." *Id.* at 181. This Court found it "sufficient to note that respondents' claims of discriminatory undercompensation are not barred by § 703(h) merely because respondents do not perform work equal to that of male jail guards." *Id.*

There would be no basis not to apply *Gunther* to a wage discrimination claim brought under 42 U.S.C. § 1981 for which there is circumstantial evidence of discrimination, as is the case here. Here, pursuant to *Gunther,* Petitioners' failure to produce evidence to show that they were paid less than White employees who performed "equal work" would not preclude them from establishing their claim of wage discrimination under 42 U.S.C. § 1981. Rather, the court can look to comparables which are not the exact same position and can look to additional evidence of discrimination.

The Fifth Circuit found Petitioners failed to establish a prima facie case under *Uviedo v. Steves Sash & Door Co.*, 738 F.2d 1425, 1431 (5th Cir. 1984) but in effect adopted the stricter standards set forth under the Equal Pay Act (EPA), 29 U.S.C. § 206(d) (1998). The "equal work" standard of the Equal Pay Act differs from the "similarity" standard. Under this narrow focus, the court found that "the four positions presented here are too dissimilar to facilitate comparison." The court failed to consider the importance of the Petitioners' role in GISD, their qualifications and experience, and that the uniqueness of their positions precluded direct comparison on limited criteria.

In effect, the Fifth Circuit has returned to the requirement that in order to establish a prima facie wage discrimination claim under the civil rights statutes, plaintiff's claim must show that the jobs being compared are "equal," a requirement that was expressly rejected by this Court in *Gunther*:

> Under petitioners reading of the Bennett Amendment, only those sex-based wage discrimination claims that satisfy the "equal work" standard of the Equal Pay Act could be brought under Title VII. In practical terms, this means that a woman who is discriminatorily underpaid could obtain no relief – no matter how egregious the discrimination might be – unless her employer also employed a man in an equal job in the same establishment, at a higher rate of pay. Thus, if an employer hired a woman for a unique position in the company and then admitted that her salary would have been higher had she been male, the woman would be unable to obtain legal redress under petitioners interpretation. . . . Moreover, to cite an example arising from a recent case, *Los Angeles Dept. of Water & Power v.*

> *Manhart*, 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978), if the employer required its female workers to pay more into its pension program than male workers were required to pay, the only women who could bring a Title VII action under petitioners' interpretation would be those who could establish that a man performed equal work: a female auditor thus might have a cause of action while a female secretary might not. Congress surely did not intend the Bennett Amendment to insulate such blatantly discriminatory practices from judicial redress under Title VII.

Gunther, 452 U.S. at 178-179.

In response to this argument raised by the Petitioners, the Fifth Circuit ignored *Gunther* and held:

> Appellants warn that ruling against them will insulate all high-level managerial positions from discriminatory compensation claims because no two such positions will ever have similar duties. We disagree, and in any case the four positions presented here are too dissimilar to facilitate comparison.

Appendix A at App.8, n.11.

The history regarding the proof requirement is instructive. The Fifth Circuit had previously explicitly stated that without direct evidence of discrimination, the plaintiff had to meet the equal pay standards of the Equal Pay Act. *See Plemer v. Parsons-Gilbane,* 713 F.2d 1127, 1133 (5th Cir. 1983). Under *Plemer* when a plaintiff alleged "equal pay for equal work" based on sex, the Fifth Circuit would require evidence of a transparently sex-based wage discrimination system or *direct evidence* (other

than that which the plaintiff offers in support of the EPA claim) of sex-based wage discrimination. 713 F.2d at 1133. Citing *Gunther*'s continual references to the uniqueness of the plaintiffs' claim and the strength of the evidence being offered (*i.e.*, direct evidence) in *Gunther*, *Plemer* determined that the Supreme Court "was concerned with *blatant* cases of sex discrimination in which the only stumbling block to underpaid females' causes of action was the fact that the victimized women did not hold jobs similar to those held by men." 713 F.2d at 1133 (emphasis added).

Other circuits followed suit. *See E.E.O.C. v. Sears, Roebuck & Co.*, 839 F.2d 302, 343 (7th Cir. 1988) (without direct evidence of intentional sex-based wage discrimination, plaintiff "must meet the equal pay standard of the EPA to prove . . . Title VII sex discrimination in wages claim"); *McKee v. Bi-State Development Agency,* 801 F.2d 1014, 1019 (8th Cir. 1986) ("Where a claim is for unequal pay for equal work based upon sex, the standards of the Equal Pay Act apply whether the suit alleges a violation of the Equal Pay Act or of Title VII."); *Foster v. Arcata Associates, Inc.*, 772 F.2d 1453, 1465 (9th Cir. 1985) ("when a Title VII claimant contends that she has been denied equal pay for substantially equal work, . . . Equal Pay Act standards apply").

In 1984, the Fifth Circuit adopted the standard as announced in *Uviedo v. Steves Sash & Door Co.*, 738 F.2d 1425, 1431 (5th Cir. 1984), *cert. denied*, 474 U.S. 1054 (1986): "To establish a prima facie case of discrimination respecting compensation a plaintiff must prove (1) that she is a member of a protected class, and (2) that she is paid less than a nonmember for work requiring substantially the same responsibility." And in *Merrill v. Southern*

Methodist Univ., 806 F.2d 600, 606-07 (5th Cir. 1986), the Fifth Circuit adopted Gunther, stating that to establish a prima facie case "plaintiff need not necessarily prove that she performed work equal to that of her better paid male colleague," indicating that a prima facie case could be created by proof that jobs were "substantially the same."

However, as seen in the *Williams* decision, although the Fifth Circuit states it continues to follow the standard of *Uviedo* in effect it has regressed to the standard of *Plemer* as the Fifth Circuit once again fails to follow the requirement of *Gunther*.

The analysis followed by the Fifth Circuit in *Williams* is far too narrow. The Fifth Circuit erred in not equating the job responsibilities of Dr. Williams as being on par with that of Ms. Garcia and Mr. McLarty and that of Ms. Watkins being on par with Mr. McLarty; i.e., work requiring substantially the same level of responsibility. The Fifth Circuit also erred in failing to give sufficient weight to factors such as education, credentials, actual job responsibilities, experience in education, and experience with the district, training, work volume, contribution to the organization, authority and importance within the district; all valid and necessary factors to be reviewed. *See McGuinness v. Lincoln Hall*, 263 F.3d 49, 53-54 (2d Cir. 2001) (an employee must be similarly situated as to material respects, not in all respects); *Lees v. Case-Hoyt Corp.*, 779 F.Supp. 717, 726 (W.D.N.Y. 1991) (reliance not upon job title, but upon actual work performed and responsibilities, experience, education, etc.); *Walton v. Cowin Equipment Co., Inc.*, 774 F.Supp. 1343, 1345 (W.D. Ala. 1991), *aff'd*, 974 F.2d 1348 (11th Cir. 1992) ("It would indeed be a rare case in which a black employee . . . is able to present a precise and exact comparison, or an equation, between her

job responsibilities and those of a higher paid non-protected employee"); *Coleman v. Wayne State Univ.*, 664 F.Supp. 1082 (E.D. Mich. 1987) (court weighed factors of plaintiff's considerable educational background and training, as well as the fact that she had written and lectured extensively, and the successes in her career).

Furthermore, the Fifth Circuit failed to address all other evidence of discrimination and failed to recognize that *Gunther* allows a uniquely situated employee to maintain a wage discrimination action even when no exact comparable can be found. That evidence includes that Dr. Williams was purposefully steered into the position, that she was promised that such a position would remain on par with Ms. Garcia, and that the pay structure regarding Dr. Williams and Ms. Watkins violated numerous GISD and/or TASB policies, a fact confirmed by a study which specifically addressed the wage disparity at issue here. This far too narrow view by the Fifth Circuit violates *Gunther* and the objectives behind the civil rights statutes.

Question Number Two: As there is no definitive standard as to what constitutes a prima facie case of discrimination in the wage discrimination context, whether this leads to inconsistent and unjust results throughout the Circuit Courts of Appeals, and as such should be addressed by this Court.

In the wage discrimination context, there is no definitive standard as to what constitutes a prima facie case of discrimination. In *Furnco Construction Corp. v. Waters,* 438 U.S. 567, 579-80, 98 S.Ct. 2943, 2950-51, 57 L.Ed.2d 957 (1978), this Court noted that a prima facie case in this context "is simply proof of actions taken by the employer from which we infer discriminatory animus because

experience has proved that in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations."

In order for a plaintiff to establish a prima facie case of compensation discrimination, some courts require the plaintiff show (1) she is a member of a protected class and (2) similarly situated to higher paid employees. *See, e.g., Amro v. Boeing Co.*, 232 F.3d 790, 798 (10th Cir. 2000) ("A person alleging a Title VII wage discrimination claim must show, as part of his [or her] prima facie burden, that he [or she] was paid less, or given a lesser raise, than other similarly situated non-protected class employees.") (citation omitted); *Austin v. Ford Models, Inc.*, 149 F.3d 148, 154 (2d Cir. 1998) (stating that a former employee failed to allege a prima facie case of age discrimination under the ADEA with regard to provision of overtime pay, where former employee did not allege that overtime pay was given only to employees younger than her, former employee admitted that overtime was paid to other similarly situated female employees, and former employee failed to allege any other facts giving rise to inference of discrimination); *Johnson v. Univ. of Wis. – Eau Claire*, 70 F.3d 469, 478 (7th Cir. 1995) (holding that a prima facie case in the wage discrimination context requires a plaintiff to produce evidence that the plaintiff was paid less than a similarly-situated employee of a non-protected class while noting that "neither the Supreme Court nor th[e Seventh] Circuit has established a definitive standard") (citation omitted); *Meeks v. Computer Assocs. Int'l*, 15 F.3d 1013, 1018-19 (11th Cir. 1994) (stating that a female Title VII plaintiff establishes a prima facie case of sex discrimination by showing that she occupies a job similar to that of higher paid males).

In contrast to the "similar situation" standard, other courts have held that a plaintiff claiming compensation discrimination must establish (1) that the plaintiff is a member of a protected class and (2) that the plaintiff was performing work "substantially equal" to that of non-protected members who were compensated at higher rates than the plaintiff. *See, e.g., Buettner v. Arch Coal Sales Co., Inc.*, 216 F.3d 707, 719 (8th Cir. 2000), *cert. denied*, 531 U.S. 1077, 121 S.Ct. 773, 148 L.Ed.2d 672 (2001) (addressing whether two jobs entail equal skill, effort, or responsibility for purposes of a Title VII wage discrimination claim requires practical judgment on the basis of all the facts and circumstances of a particular case); *Anderson v. Zubieta,* 180 F.3d 329, 339 (D.C.Cir. 1999) (discussing prima facie case of wage discrimination based on race, where plaintiffs must show membership in a protected class and that they were performing work substantially equal to that of white employees who were compensated at higher rates than they were); *Aman v. Cort Furniture Rental Corp.,* 85 F.3d 1074, 1087 (3d Cir. 1996) (stating that in order to establish case of unequal pay based on race in violation of Title VII, plaintiffs must demonstrate that they were performing work substantially equal to that of employees of other races who were compensated at higher rates than they were).

The waters are muddied even further as to which courts, if any, fully integrate *Gunther* into their analysis. The Eighth Circuit, at least in theory, has recognized that the standard under Title VII (and therefore also section 1981) is more liberal than that under the EPA. *Orahood v. Board of Trustees*, 645 F.2d 651, 655 (8th Cir. 1981) (the court held that a Title VII claim can be "invoked in situations of discrimination involving inadequate compensation

where the plaintiff's work is comparable (but not substantially equal) work or where the position held by the plaintiff is unique"). However, in *Tenkku v. Normandy Bank*, 348 F.3d 737, 742 (8th Cir. 2003), as the plaintiff failed to specifically cite to *Gunther*, the Eighth Circuit held that her Title VII claims would be addressed as EPA claims. *See also*, *Buettner v. Arch Coal Sales Co., Inc.*, 216 F.3d 707, 718-19 (8th Cir. 2000) (conducting analysis of a Title VII claim under the framework of the EPA where the alleged discrimination related solely to unequal pay for equal work).

Also of note, in 29 C.F.R. § 1620.13(b)(2), the EEOC guidelines seemingly fail to recognize the difference between proof of an Equal Pay Act claim, and proof of a Title VII claim by indirect evidence under the *McDonnell Douglas* burden-shifting formula.

These differing standards throughout the circuits on an important matter warrant consideration by this Court.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

ANTHONY P. GRIFFIN
Counsel of Record

DEBORA L. PERKEY
ANTHONY P. GRIFFIN, INC.
Lawyers
1115 Moody
Galveston, Texas 77550
409.763.0386
1.800.750.5034
Facsimile No. 409.763.4102

Counsel for Petitioners
Patricia Williams and
Terri L. Watkins

APPENDIX

TABLE OF CONTENTS

Page

APPENDIX A – *Williams v. Galveston Indep. Sch. Dist.*, 78 Fed.Appx. 946, No. 03-40436 (5th Cir. October 23, 2003) ..... App. 1

APPENDIX B – *Williams v. Galveston Indep. Sch. Dist.*, 256 F.Supp.2d 668 (S.D. Tex. 2003) ..... App. 10

APPENDIX C – Vacancy Announcement, Executive Director of Employee & Community Relations .... App. 29

APPENDIX D – Vacancy Announcement, Executive Director of Human Resources ..... App. 33

APPENDIX E – Vacancy Announcement, Chief Financial Officer ..... App. 37

APPENDIX F – Vacancy Announcement, Assistant Superintendent for Curriculum & Instruction ..... App. 42

APPENDIX A

78 Fed.Appx. 946

United States Court of Appeals,
Fifth Circuit.

Patricia WILLIAMS; Terri L. Watkins
Plaintiffs – Appellants,
v.
GALVESTON INDEPENDENT SCHOOL DISTRICT Defendant – Appellee.

No. 03-40436
Summary Calendar.

Oct. 23, 2003.

Appeal from the United States District Court for the Southern District of Texas. G-02-CV-236.

Anthony P. Griffin, Debora L. Perkey, Anthony P. Griffin Inc., Galveston, TX, for Plaintiffs-Appellants.

George William Vie, III, Mills Shirley, Galveston, TX, for Defendant-Appellee.

Before JONES, BENAVIDES, and CLEMENT, Circuit Judges.

BENAVIDES, Circuit Judge.*

Plaintiffs-Appellants, administrators for the Galveston Independent School District ("GISD"), filed suit against their employer under 42 U.S.C. § 1981. Appellants

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* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

allege that GISD discriminated against them on the basis of race in setting their salaries. The district court granted summary judgment in favor of GISD. Because we agree with the district court that Appellants have raised no genuine issue of material fact, we affirm.

I.

Appellant Dr. Patricia Williams serves as Executive Director of Employee and Community Relations for GISD. Appellant Terry Watkins serves as Executive Director of Human Resources. Both women are African-American.

GISD assigns each administrative position to a particular "pay grade," a group of positions that fall within the same salary range. Dr. Williams and Ms. Watkins are both in pay grade 8, the highest level. At the time this suit was filed, two other employees were also listed at pay grade 8: E.J. Garcia, Assistant Superintendent of Curriculum and Instruction; and Paul McLarty, Chief Financial Officer.[1] Ms. Garcia and Mr. McLarty are both white.

The roots of Appellants' complaint go back to 2000, when GISD reorganized its upper administration. At that time, Dr. Williams was serving as Executive Director of Personnel, and Ms. Garcia was serving as Superintendent for Instruction. Their salaries were roughly equal. After GISD created the position of Executive Director of Employee and Community Relations, then-Superintendent Henry Boening approached Dr. Williams about taking the job. Dr. Williams alleges that Superintendent Boening promised that if Dr. Williams took

[1] Mr. McLarty has since resigned.

the new position, her salary and responsibilities would stay commensurate with the salary and responsibilities assigned to Ms. Garcia. Dr. Williams accepted the new position, and Ms. Watkins succeeded her.[2]

During the two years following this reorganization, GISD awarded Ms. Garcia and Mr. McLarty substantial raises. GISD claims that it was attempting to make top administrators' salaries more competitive with market rates.[3] GISD says it did not give Appellants similar raises because Appellants' salaries were at or above market rate for their positions. Between 1999 and 2002, the four administrators in grade 8 were paid the following salaries:

	Garcia	Williams	McLarty	Watkins
99-00	$72,630	$72,630	$73,000	n.a.
00-01	$83,440	$75,129	$82,686	$71,648
01-02	$94,249	$77,630	$92,499	$76,673

Dr. Williams learned of this divergence and filed a grievance. After Superintendent Boening and the school board denied her grievance, she filed this suit. Ms. Watkins subsequently joined the suit.[4] Appellants allege that the difference between their salaries and the salaries of

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[2] GISD changed the name of this position from "Executive Director of Personnel" to "Executive Director of Human Resources."

[3] Appellants allege that Mr. McLarty and Ms. Garcia met privately with Superintendent Boening to discuss these salary increases, but that Appellants were not invited.

[4] Ms. Watkins also complained of retaliation. She has since abandoned that complaint.

their white colleagues constitutes race discrimination in violation of 42 U.S.C. § 1981.[5]

The district court granted summary judgment in favor of GISD. The court concluded that Appellants could not succeed on their claim under § 1981 because their positions did not require substantially the same responsibility as those of their white colleagues. The court also determined that Appellants had failed to raise any genuine issue of material fact on the question of whether GISD's proffered race-neutral explanations for the disparity were pretextual.

II.

We review a district court's grant of summary judgment *de novo. Price v. Fed. Express Corp.*, 283 F.3d 715, 719 (5th Cir.2002). Summary judgment is appropriate if the evidence, viewed in the light most favorable to the non-movant, raises no genuine issues of material fact and is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Price,* 283 F.3d at 719.

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[5] 42 U.S.C. § 1981(a) (2003) provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

III.

We evaluate claims of racial discrimination based only on circumstantial evidence under the familiar burden-shifting analysis of *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-05, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).[6] *See Price,* 283 F.3d at 719. Under this framework, plaintiffs begin by establishing a prima facie case of discrimination. *Pratt v. City of Houston,* 247 F.3d 601 (5th Cir.2001).

To establish a *prima facie* case of discriminatory compensation, a plaintiff must prove "(1) that she is a member of a protected class and (2) that she is paid less than a nonmember for work requiring substantially the same responsibility." *Uviedo v. Steves Sash & Door Co.,* 738 F.2d 1425, 1431 (5th Cir.1984); *see also Pittman v. Hattiesburg Mun. Separate Sch. Dist.,* 644 F.2d 1071, 1074 (5th Cir. Unit A May 1981).[7] If a plaintiff's job responsibilities are significantly different from the responsibilities of employees she cites as a point of comparison, then the plaintiff has not made out a *prima facie* case. *Id.* In considering whether two jobs require substantially the same responsibility, we have looked to the jobs' duties, *see*

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[6] Appellants evidently concede that they can offer only circumstantial evidence because they discuss only the *McDonnell Douglas* analysis. Dr. Williams suggests that Superintendent Boening steered her into her current position as Executive Director of Employee and Community Relations and away from Assistant Superintendent of Curriculum and Instruction, which eventually became a higher-paying job. This allegation cannot save her claim for *discriminatory compensation,* which requires that the plaintiff's job require substantially the same responsibility as a higher-paid employee's job. *See Uviedo v. Steves Sash & Door Co.,* 738 F.2d 1425, 1431 (5th Cir.1984).

[7] GISD does not dispute that Appellants are members of a protected class.

Uviedo, 738 F.2d at 1431; *Pittman,* 644 F.2d at 1074, including the jobs' relative supervisory authority and responsibility for revenue, *see Cullen v. Ind. Univ. Bd. of Trs.,* 338 F.3d 693, 700 (7th Cir.2003).

Appellants attempt to found their *prima facie* case on a comparison between their positions and the positions held by Mr. McLarty and Ms. Garcia.[8] However, each employee's responsibilities are plainly dissimilar from the responsibilities of the other three grade 8 employees.[9]

As Executive Director of Employee and Community Relations,[10] Dr. Williams oversees employee relations, GISD's grievance procedure, employee programs, and parental participation. She administers a budget of approximately $118,000 and supervises only one employee, her secretary.

As Executive Director of Human Resources, Ms. Watkins oversees recruitment and training of teachers and other instructional personnel, incentive and training programs, and compliance with employment discrimination laws. She also influences employee salary and benefits. Ms. Watkins

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[8] Dr. Williams compares her responsibilities to those of Ms. Garcia and Mr. McLarty. Ms. Watkins compares her responsibilities to those of Mr. McLarty only.

[9] The fact that GISD lists all four employees at grade 8 is not significant. Pay grades represent a range of possible salaries, and Appellants concede that salaries can differ within a pay grade.

[10] GISD points out that Appellants' job titles are different from the job titles of Mr. McLarty and Ms. Garcia. The name given to a particular job adds little to our analysis where, as here, the substance of the four jobs clearly differs. *See Dey v. Colt Constr. & Dev. Co.,* 28 F.3d 1446, 1461 (7th Cir.1994); *Orahood v. Bd. of Trs. of Univ. of Ark.,* 645 F.2d 651, 654 (8th Cir.1981) ("We look to the actual job requirements and performance, not on-job classifications or titles.").

oversees a somewhat larger budget – approximately $290,000 – and five employees report directly to her.

Assistant Superintendent Garcia oversees GISD's instructional programs and helps in the planning and evaluation of those programs. She also serves as acting superintendent when the permanent superintendent leaves the district. Ms. Garcia administers a budget of approximately $13 million. Eight employees report directly to her, and she assists with the supervision of all principals within GISD.

Chief Financial Officer McLarty oversees GISD's entire budget as well as maintenance, transportation, food service, athletic programs, insurance, worker compensation, district elections, and revenue collection. Six employees report directly to him, and he indirectly supervises approximately 350 GISD employees.

These descriptions demonstrate that the four grade 8 positions differ in many respects. Not only are their responsibilities dissimilar in substance, but the scope of their authority over GISD funds and employees differs. These four employees do not have "substantially the same responsibility," *Uviedo,* 738 F.2d at 1431. These differences fatally undercut Appellants' claim for discriminatory compensation because "[i]t is not discrimination to treat differently situated persons differently." *Walton v. Bisco Inds.,* 119 F.3d 368, 373 (5th Cir.1997).

Appellants nonetheless describe their responsibilities as comparable to the other grade 8 employees' responsibilities because all four grade 8 employees represent the district to the community and participate in district-wide planning, policymaking, and leadership. Described at this

level of generality, almost any managerial position would have the same responsibility as Appellants' positions do.[11]

Appellants emphasize that they are important to the district. We have no doubt that their positions are crucial to GISD's operations. Undoubtedly Galveston's principals, teachers, and support staff also play crucial roles in the provision of education. In evaluating a claim of discriminatory compensation, we do not attempt to evaluate the importance of an employee's role in her organization. Rather, we look to the duties that employee performs. *See Uviedo,* 738 F.2d 1425; *Pittman,* 644 F.2d at 1074.

Appellants also assert that their qualifications and experience equal or exceed those of their colleagues. These considerations are likewise irrelevant when, as in this case, similarly qualified persons have taken dissimilar jobs.

IV.

Appellants have failed to adduce any evidence showing that they have substantially the same responsibility as purportedly comparable employees. Appellants have therefore failed to raise any genuine issue of material fact as to their *prima facie* case. Because Appellants have faltered on the first step of the *McDonnell Douglas* analysis, we need look no further. *See Pittman,* 644 F.2d at

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[11] Appellants warn that ruling against them will insulate all high-level managerial positions from discriminatory compensation claims because no two such positions will ever have similar duties. We disagree, and in any case the four positions presented here are too dissimilar to facilitate comparison.

1074-75. We therefore AFFIRM the district court's grant of summary judgment.

APPENDIX B

256 F.Supp.2d 668

United States District Court,
S.D. Texas,
Galveston Division.

Patricia WILLIAMS, Plaintiff,
v.
GALVESTON INDEPENDENT SCHOOL DISTRICT, Defendant.

No. CIV.A. G-02-236.

March 24, 2003.

Anthony P. Griffin, Attorney at Law, Galveston, TX, for Patricia Williams, plaintiff.

Carla Jean Cotropia, Mills Shirley LLP, Houston, TX, for Galveston Independent School District, defendant.

ORDER GRANTING GALVESTON INDEPENDENT SCHOOL DISTRICT'S MOTION FOR SUMMARY JUDGMENT

KENT, District Judge.

Plaintiffs Patricia Williams ("Williams") and Terri Watkins (Watkins) (collectively as "Plaintiffs") bring this action against their employer Galveston Independent School District ("GISD"). Plaintiffs, who are African-American, allege that GISD is unlawfully discriminating against them because GISD pays two white coworkers higher salaries, despite that Plaintiffs and their white colleagues allegedly have similar jobs with substantially similar responsibilities. Plaintiffs seek damages for GISD's alleged discriminatory conduct under 42 U.S.C. § 1981. Now before the Court is Galveston Independent School

District's Motion for Summary Judgment, and Plaintiffs' timely response thereto. After careful thought and considerable deliberation, the Court concludes that GISD's Motion must be **GRANTED** for the reasons articulated below.

I. FACTUAL BACKGROUND

The following are the undisputed facts of this case. Williams and Watkins are both GISD employees. Williams has been employed by GISD for over thirty-one years and is currently the Executive Director of Employee and Community Relations. Watkins began her employment with GISD in 1990. In 2001, Watkins was promoted to her current position, Executive Director of Human Resources. Within GISD, there are sixty-two administrators, excluding the Superintendent, whose positions are included in GISD's "Exempt and Administrative Pay Schedule." GISD's Exempt and Administrative Pay Schedule has various pay grades that regulate minimum and maximum daily ranges of pay for administrators in each grade. Within GISD, there are eight pay grades; pay grade eight represents the highest range of salaries while pay grade one represents the lowest. There are only four administrative positions in pay grade eight: (1) Executive Director of Employee and Community Relations Williams (black female); (2) Executive Director of Human Resources Watkins (black female); (3) Assistant Superintendent of Curriculum and Instruction E.J. Garcia ("Garcia") (white female); and (4) GISD Chief Financial Officer Paul McLarty ("McLarty") (white male).[1] Garcia and Williams

[1] Although McLarty recently left GISD, he was CFO during the relevant times for purposes of this lawsuit.

entered pay grade eight in the 1995-1996 school year, while Watkins and McLarty entered pay grade eight in the 1999-2000 school year. Currently, pay grade eight has a minimum daily rate of $292.44 and a maximum daily rate of $387.66. Over the past three years, the four administrators in pay grade eight were paid as follows:

	Garcia	Williams	McLarty	Watkins
99-00	$72,630	$72,630	$73,000	$ ___
00-01	$83,440	$75,129	$82,686	$71,648
01-02	$94,249	$77,630	$92,499	$76,673

After Williams learned of the widening gap between her salary and her white counterparts, she complained to then Superintendent Henry Boening. After several discussions with Boening about the disparity in compensation, Williams filed a grievance, which was later denied by Boening. Williams then brought her grievance to the School Board, which denied it on March 28, 2002. Following the School Board's denial, Williams filed this lawsuit on April 5, 2002. Subsequently, Watkins joined this lawsuit on August 14, 2002.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c); *see also Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). When one party moves for summary judgment, the nonmoving party must set forth specific facts showing that there is a genuine issue for trial. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). Issues of material fact are "genuine" only if they require

resolution by a trier of fact. *See id.* at 248, 106 S.Ct. at 2510. The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; rather, only disputes over facts that might affect the outcome of the lawsuit under governing law will preclude the entry of summary judgment. *See id.* at 247-48, 106 S.Ct. at 2510. Nevertheless, if the evidence is such that a reasonable fact-finder could find in favor of the nonmoving party, summary judgment should not be granted. *See id.; see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986); *Dixon v. State Farm Fire & Cas. Co.,* 799 F.Supp. 691 (S.D.Tex.1992) (noting that summary judgment is inappropriate if the evidence could lead to different factual findings and conclusions). Determining credibility, weighing evidence, and drawing reasonable inferences are left to the trier of fact. *See Anderson,* 477 U.S. at 255, 106 S.Ct. at 2513.

III. ANALYSIS

Plaintiffs allege race discrimination under 42 U.S.C. § 1981 primarily because GISD's two white pay grade eight employees have received substantially larger raises over the last three years than GISD's two black pay grade eight employees. Additionally, it appears from Plaintiffs' First Amended Complaint that Watkins alleges GISD wrongfully retaliated against and harassed her after Williams filed this lawsuit. GISD moves for summary judgment on both claims arguing that Plaintiffs cannot establish a *prima facie* case on either claim. Alternatively, GISD contends that even if Plaintiffs make out a *prima facie* case, Plaintiffs cannot meet their ultimate burden to

prove that GISD's legitimate, nondiscriminatory reasons for the discrepancy in salaries is mere pretext for unlawful racial discrimination, as required under *McDonnell Douglas.*

A. McDonnell Douglas Burden-Shifting Analytical Framework

"The Court's inquiry into intentional race discrimination is essentially the same for individual actions brought under [sections] 1981 and 1983, Title VI and Title VII." *Baldwin v. Univ. of Texas,* 945 F.Supp. 1022, 1031 (S.D.Tex.1996). To determine whether intentional discrimination exists, the Fifth Circuit applies the burden-shifting analytical framework established in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *See, e.g., Long v. Eastfield Coll.,* 88 F.3d 300, 304 (5th Cir.1996) (applying the *McDonnell Douglas* framework to unlawful retaliation cases); *Johnson v. Chapel Hill Indep. Sch. Dist.,* 853 F.2d 375, 381 (5th Cir.1988) (applying the *McDonnell Douglas* analysis to a differential treatment case). Under the *McDonnell Douglas* framework, the Court employs a three-part test designed to ascertain a defendant's motivation in taking the challenged action. *See McDonnell Douglas,* 411 U.S. at 803-04, 93 S.Ct. at 1824-25; *Quintanilla v. K-Bin, Inc.,* 8 F.Supp.2d 928, 933 (S.D.Tex.1998). First, a plaintiff must establish a *prima facie* case by proving the elements of a discrimination claim. *See Russell v. McKinney Hosp. Venture,* 235 F.3d 219, 222 (5th Cir.2000). If the plaintiff proves his *prima facie* case, a presumption of discrimination arises. *See Bodenheimer v. PPG Indus., Inc.,* 5 F.3d 955, 957 (5th Cir.1993). The burden of production then shifts to the defendant to rebut this presumption by

articulating a legitimate, nondiscriminatory reason for the alleged discriminatory conduct. *See Russell,* 235 F.3d at 222; *Olitsky v. Spencer Gifts, Inc.,* 964 F.2d 1471, 1478 n. 19 (5th Cir.1992). A defendant meets this burden by proffering admissible evidence of an explanation that would be legally sufficient to justify a judgment for the defendant. *See Guthrie v. Tifco Indus.,* 941 F.2d 374, 376 (5th Cir.1991). This does not require the defendant to persuade the trier of fact that there was no intentional discrimination; rather, the defendant needs only to produce evidence on that point. *See St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 507-08, 113 S.Ct. 2742, 2747-48, 125 L.Ed.2d 407 (1993).

The presumption of discrimination established by a plaintiff's *prima facie* case dissolves if the defendant successfully articulates a legitimate, nondiscriminatory reason for its conduct. *See Texas Dept. of Cmty. Affairs v. Burdine,* 450 U.S. 248, 255, 101 S.Ct. 1089, 1095 n. 10, 67 L.Ed.2d 207 n.10 (1981). In order to carry plaintiff's ultimate burden at this point, a plaintiff must then produce evidence that the defendant's proffered reason is mere pretext for unlawful discrimination. *See Porter v. Exxon Mobil Corp.,* 246 F.Supp.2d 615, 619 (S.D.Tex.2003). A plaintiff need not always provide additional evidence of discrimination beyond its *prima facie* case because "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves v. Sanderson Plumbing Prod., Inc.,* 530 U.S. 133, 148, 120 S.Ct. 2097, 2109, 147 L.Ed.2d 105 (2000).

B. Plaintiffs Fail to Present a Prima Facie Case of Discriminatory Compensation

To state a *prima facie* case of compensation discrimination under 42 U.S.C. § 1981, Plaintiffs must show that (1) they are members of a protected class, and (2) they were paid less than members outside of the protected class despite having substantially similar responsibilities. *See Uviedo v. Steves Sash & Door Co.*, 738 F.2d 1425, 1431 (5th Cir.1984). GISD concedes that Plaintiffs are members of a protected class (African-American). Instead, GISD vigorously argues that Plaintiffs cannot produce a genuine issue of material fact indicating that Williams's and Watkins's positions are substantially similar in responsibilities to either Garcia's or McLarty's positions; hence, Plaintiffs' claims fail as a matter of law because they have failed to make out the second element of their discriminatory compensation claims. The Court agrees.

Williams argues that her position is comparable to both Garcia's and McLarty's positions and Watkins contends that her position is comparable to McLarty's position. Although the Court candidly admits that all four employees of GISD that are being compared to each other are highly qualified and assigned to the same pay grade, the Court respectfully finds that it cannot be seriously argued that Plaintiffs' positions carry substantially similar responsibilities as compared to Garcia's and McLarty's positions.

As CFO, McLarty oversaw GISD's budget of $67 million in general and special funds. According to Watkins's testimony, the CFO oversees the maintenance, operations, transportation, food service, athletics, purchasing, and finance departments. Further, the CFO has six directors that report directly to him and he oversees

roughly 350 employees. Moreover, according to the job description, the CFO must (1) supervise the "operations of Galveston Tax Collections"; (2) manage GISD's real estate, as well as GISD's property insurance, health insurance, and worker's compensation programs; (3) coordinate the construction and maintenance of GISD buildings; and (4) ensure that GISD "implement[s] the policies established by federal and state law, State Board of Education rule, and the local [ ] board policy in the area of business operations." The aforementioned job responsibilities are just the highlights from the summary judgment evidence before the Court.

As Assistant Superintendent, Garcia oversees a budget in excess of $13 million in local, state, and federal funds. Garcia is primarily in charge of overseeing the educational programs that GISD provides. Moreover, Garcia has eight directors that report directly to her. According to her job description, Garcia must (1) plan, implement, and evaluate instructional programs; (2) facilitate the use of technology in the teaching-learning process; (3) develop GISD's goals and objectives; (4) "implement the policies established by federal and state law, State Board of Education Rule, and the local board policy in the area of curriculum and instruction"; and (5) "supervise and evaluate the performance of instructional supervisors and support staff in the curriculum department." Again, these are just the main job responsibilities that the Court has gleaned from the many that the Assistant Superintendent must undertake.

On the other hand, Williams has no directors that report to her and the only employee that does is her secretary. Williams's budget for the past school year was $118,312. According to her job description, Williams's role

as Executive Director of Employee and Community Relations primarily requires her to (1) "provide guidance to district administrative personnel and supervisory personnel in matters concerning employee relations"; (2) recommend and revise employee relations policies; (3) administer GISD's employee grievance procedure; (4) coordinate the "Grow Your Own" employees program; (5) develop a wellness program for GISD employees; (6) develop and implement the annual community outreach plan; and (7) develop and implement a "Parent Involvement Plan" to increase parental participation, amongst other obligations.

Watkins is the Executive Director of Human Resources. Watkins's budget for her department is $287,802. She has five employees that directly report to her although none of them are directors. According to her job description, Watkins must (1) encourage and promote incentive and recognition programs for employees; (2) coordinate GISD's recruitment and training program for GISD's new teachers, administrators, and staff; (3) make recommendations concerning employees' salaries and benefits; (4) administer GISD's employee evaluation; and (5) ensure that GISD is in compliance with state and federal equal employment laws, amongst other obligations.

The Court admits that it did not exhaust each of the four jobs' listed responsibilities in the instant Order. The Court is also well aware that each of these employees takes on numerous responsibilities that are not covered under the broad guidelines laid out in the job descriptions. Regardless, the Court feels that is has given a sufficient overview of each position so that it is certain that no reasonable juror could find that either of Plaintiffs' job responsibilities are substantially comparable to either

Garcia's or McLarty's job responsibilities. Although all of these employees are in the same pay grade, that alone does not create a fact question as to whether or not their positions have substantially similar responsibilities. With all due respect to Plaintiffs, Garcia's and McLarty's positions' have considerably different and greater oversight responsibilities than Plaintiffs' positions. This is evident by reviewing the GISD Administrative Organizational Chart; eight directors report to Garcia, while six report to the CFO. On the other hand, none report to Plaintiffs. Furthermore, Plaintiffs' respective budgets for their departments are dwarfed by Garcia's and McLarty's budgets.

Williams argues that since her position requires Texas mid-management, PDAS, *and* ILT certification, while Garcia's position requires Texas mid-management *or* other appropriate Texas certifications, a fact question exists as to the similarity of Garcia's and Williams's job responsibilities since Williams's position requires an additional qualification. Similarly, Watkins argues that since McLarty's and her position have identical educational requirements listed on the job description, a fact question exists as to the two positions' responsibilities and the similarity thereto. The Court does not dispute that Plaintiffs are just as qualified as Garcia and McLarty; in fact, the Court wants to make abundantly clear that its holding does not rest on any such finding. The fact that a position requires an additional qualification than another or that two positions have identical qualifications, does not mean that the positions are substantially similar in terms of their responsibilities for the Court's analysis. The Court's focus is on the positions' responsibilities at the time of the alleged discrimination, not the positions' mandatory

qualifications at the time of hiring. *See Lowery v. Univ. of Houston-Clear Lake,* 82 F.Supp.2d 689, 696-97 (S.D.Tex.2000). For example, assume a corporation that manufactures fishing rods is looking for a sales manager for Galveston County on one hand, and seeking a sales manager to oversee the area encompassing Texas, Louisiana, and Alabama on the other. The corporation would likely require the same educational requirements for each sales manager position. Yet, it is quite a stretch to suggest that the two sales manager positions have substantially similar responsibilities. Similar to the case at hand, the four positions that are being compared require essentially the same educational qualifications. It may also be true that Plaintiffs themselves could successfully perform the jobs of CFO and Assistant Superintendent. However, merely because Plaintiffs have the potential to perform the comparable positions in question does not mean that Plaintiffs' *current* positions have responsibilities that are substantially similar to the Assistant Superintendent for Curriculum and Instruction's and Chief Financial Officer's responsibilities. For all the reasons expressed above, the Court concludes that GISD's Motion must be **GRANTED** because Plaintiffs have failed to present a *prima facie* case of racial discrimination based upon the disparity of pay in GISD's pay grade eight.

C. GISD's Legitimate, Nondiscriminatory Reasons for the Allegedly Discriminatory Discrepancies

Assuming, *arguendo,* that Plaintiffs could present a *prima facie* case, the Court now considers GISD's articulated reasons for the discrepancy in pay grade eight salaries. GISD gives two reasons for its decision to dramatically increase McLarty's and Garcia's compensation,

while not doing the same for Plaintiffs. First, GISD recently eliminated the Assistant Superintendent for Administration position after Barbara McIlveen retired in December 1999. GISD contends that Garcia and McLarty picked up the bulk of the eliminated position's responsibilities; hence, they deserved more compensation. GISD's more salient and pressing reason for the dramatic raises is that the Texas Comptroller's Report ("Report") recommended GISD raise its salaries for certain administrative positions because GISD was paying considerably below market in comparison to other school districts.[2] The Report was presented to GISD in June 2000. It recommended that GISD eliminate the position of Assistant Superintendent for Administration, which GISD did. Additionally, the Report recommended the creation of Williams's current position, Executive Director of Employee and Community Relations, which Williams accepted at Boening's urging.

According to GISD, in response to the Report, Boening sought to raise administrators' salaries to levels that were comparable with other school districts. To do so, Boening employed the Texas Association of School Boards' ("TASB") Salary Study to determine what the market rates were for certain positions. GISD submits its Approved Fiscal Year 2001 Salary Adjustments chart ("Chart") as evidence of its intent. According to the Chart, in the 1999-2000 school year, the following were the actual salaries of the relevant administrators: (1) CFO-$73,000; (2) Assistant Superintendent of

[2] Recently, the Texas Comptroller's Office conducted an audit of several school districts, including GISD, in order to make recommendations on how each school district could save money while simultaneously improving the performance of its students.

Curriculum and Instruction-$72,630; (3) Executive Director of Employee and Community Relations-$72,630; and (4) Executive Director of Human Resources-$71,576.[3] In the same year, the Chart lists the following as the TASB Study's average salaries for each of the above positions: (1) CFO-$87,373; (2) Assistant Superintendent of Curriculum and Instruction-$89,251; (3) Executive Director of Employee and Community Relations-$71,576;[4] and (4) Executive Director of Human Resources-(none was provided because this position was vacant within GISD at the time of the study). According to the Chart's descriptions of GISD's actions, GISD determined to raise the salaries for Garcia's and McLarty's positions, as well as many other positions, over two years so that GISD would eventually pay those positions the TASB Study average. Next, GISD described Williams's position as "currently above market" when compared to the TASB Study; thus, GISD only gave Williams a cost-of-living adjustment. The Chart did not make any recommendation for Executive Director of Human Resources because the position was vacant (Watkins would subsequently take over this role) at the time of

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[3] GISD did list the Executive Director of Human Resources's salary on the Chart despite that the position was vacant at the time the Approved Fiscal Year 2001 Salary Adjustments chart was created.

[4] The TASB Study does not have a specific position named Executive Director of Employee and Community Relations. According to Former Superintendent Boening's affidavit, "The salary studies also revealed that there were not comparable positions in the other districts to that held by Dr. Williams. She was assigned to the new position with the same salary she had as Executive Director of Personnel. Because she dealt with employees, I determined that the best possible comparable to use would be director of personnel's position to determine market value of the job. Dr. Williams's salary was at or above market value."

this particular report. Similarly, according to GISD's Approved Fiscal Year 2002 Salary Adjustments chart, GISD raised McLarty's and Garcia's salary again, which brought their salaries in line with the TASB study average-consistent with GISD's two-year plan. Again, Williams only received a cost-of-living adjustment because her current salary was described as "currently above market." On the other hand, Watkins received a cost-of-living adjustment plus an additional $2526 raise because so that her salary was equal to the TASB Study average for her position.

Board members' depositions and former Superintendent Boening's affidavit corroborate GISD's Salary Adjustments charts and the reasons stated therein for GISD's determination to raise salaries in the manner that it did. GISD's stated reasons for its conduct are also consistent with the Texas Comptroller's Report. Given that GISD took these actions following the Report, and the general timing of the events surrounding this lawsuit, GISD's tendered reasons appear to accurately describe a school district's efforts to streamline its operations while keeping its key employees, all in an effort to improve the public education offered. Having reviewed all of the relevant summary judgment evidence before the Court, the Court finds, as a matter of law, that GISD's two proffered reasons for the discrepancies between the four positions' salaries qualify as legitimate, nondiscriminatory reasons. Having found such, the inference of discrimination, had it been created by Plaintiff's *prima facie* evidence, dissolves. *See Lowery,* 82 F.Supp.2d at 698.

D. Plaintiffs Fail to Show Evidence of Pretext Necessary to Overcome GISD's Legitimate, Nondiscriminatory Reasons

Plaintiffs must now prove by a preponderance of evidence that GISD's articulated legitimate, nondiscriminatory reasons were not the actual reasons for its compensation scheme, but that such reasons were mere pretext for unlawful discrimination. *Reeves,* 530 U.S. at 143, 120 S.Ct. at 2106. Plaintiffs need not come forward with direct evidence of discriminatory intent. Rather, "'[t]he factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination.'" *Lowery,* 82 F.Supp.2d at 699 (quoting *Hicks,* 509 U.S. at 511, 113 S.Ct. at 2749). Plaintiffs advance a variety of arguments as to why GISD's articulated reasons are mere pretext.

First, Plaintiffs assert that while GISD claims to adhere to the TASB Study in determining the salaries for the four employees in question, it did not follow other TASB policies that recommend where to start newly hired employees' salaries. Specifically, Plaintiffs point to the fact that McLarty was recently hired by GISD but paid significantly more than Williams, Garcia, and Watkins, all longtime GISD employees. Plaintiffs claim that GISD paid McLarty substantially above TASB recommendations, despite his "very limited school finance background." In doing so, Plaintiffs point to TASB policy 5.12, titled "Optional hiring guideline," which states: "If a new employee is hired above the minimum rate, the following guide may be used to give placement credit for significant job-related experience." TASB policy 5.12 then recommends paying

new employees on a sliding scale up to mid-range in a particular pay grade, depending upon each employee's job-related experience. Plaintiffs point to McLarty's salary, substantially above the suggested guideline, as evidence that GISD's articulated reason is mere pretext. Additionally, Plaintiffs argue that GISD violated TASB policy 4.19 because one of its enumerated seven criteria in establishing employees' salaries is to create "[a] range of pay, from minimum to maximum . . . to reward experience."

The Court finds Plaintiffs' arguments unpersuasive. The Court does not dispute that GISD disregarded TASB policy in hiring and giving substantial raises to McLarty soon thereafter. However, TASB policy 5.12 is optional, as indicated by its title. Second, prior work experience is one of seven enumerated criteria that GISD should take into account in formulating salaries according to TASB policy 4.19. Even if the actions that GISD took regarding McLarty's salary were discriminatory, it does not indicate any evidence of unlawful racial discrimination. Rather, it appears that raising McLarty's salary to the TASB Study average only discriminated against employees in that it did not take into account their previous experience with GISD. Hence, overlooking McLarty's prior work experience with school finance (or lack thereof) in giving him his raises discriminated against all GISD employees with significant work experience in their respective fields, including white employees. Therefore, the Court holds that Plaintiffs' first argument does not demonstrate that GISD's proffered reasons were mere pretext for unlawful *race discrimination. See Reeves,* 530 U.S. at 143, 120 S.Ct. at 2106.

Next, Plaintiffs argue that GISD's alleged nondiscriminatory reason for raising McLarty's and

Garcia's salaries because of the additional responsibilities that they undertook as a result of eliminating McIlveen's position is pretext because Williams also undertook some of McIlveen's former responsibilities. The Court agrees. Garcia admitted in her deposition that Williams took over some of McIlveen's responsibilities. Although it is highly contested how many of McIlveen's duties that Garcia, McLarty, and Williams undertook, the fact that Williams undertook some of her responsibilities creates a material fact question as to one of GISD's proffered reasons for the discrepancy of salaries amongst the four employees in question.

Despite the Court's belief that a genuine issue of material fact exists as to one of GISD's proffered legitimate, nondiscriminatory reasons, the Court concludes, as it must, that Plaintiffs have failed to present any genuine issues of material fact that GISD's nondiscriminatory reason of raising McLarty's and Garcia's salaries significantly more than Watkins's or Williams's salaries in order to conform to the TASB Study is mere pretext for unlawful racial discrimination. The Court believes its findings are also supported by the spirit of *Faruki v. Parsons S.I.P., Inc.,* 123 F.3d 315, 320 n. 20 (5th Cir.1997). In concluding that the plaintiff in that case failed to raise a fact question as to whether the defendant's reasons for his termination were pretextual, the Fifth Circuit noted that:

> Our conclusion that Agha failed to show Parsons's proffered reasons are pretextual is buttressed by the fact that Taylor, the manager who terminated Agha, was the same individual who hired Agha. Where, as here, the same actor hires and fires an employee, an inference that discrimination was not the employer's motive in terminating the employee is created.

Id. Former Superintendent Boening, according to Williams's and Watkins's deposition testimony, hired both of them for their current positions. Yet, Plaintiffs now argue to this Court that Boening, the same person who hired and promoted Plaintiffs, unlawfully discriminated against them. After reviewing all of the summary judgment evidence, the Court concludes that Plaintiffs, other than their own bald assertions, have failed to present sufficient evidence on their *prima facie* case of unlawful discrimination, and alternatively, failed to raise a material fact question as to whether GISD's legitimate, nondiscriminatory reason for raising salaries in the manner that it did, to conform to the TASB Study, was mere pretext for unlawful race discrimination. Thus, after careful thought, GISD's Motion is **GRANTED.**

E. Watkins's Retaliation Claim

Watkins made various allegations that GISD retaliated against her after Williams filed her original suit. In order to state a *prima facie* claim of retaliation, Watkins must show: (1) she participated in some statutorily protected activity; (2) she suffered an adverse employment action; and (3) a casual connection exists between the protected activity and the adverse action. *See Mota v. The Univ. of Texas Houston Health Sci. Ctr.,* 261 F.3d 512, 519 (5th Cir.2001). In Plaintiffs' response, Watkins conceded that her retaliation claim should be dismissed. Accordingly, GISD's Summary Judgment is **GRANTED** on Watkins's retaliation claim.

IV. CONCLUSION

Before concluding, the Court notes that the briefs before the Court in this matter were truly excellent. The Court should hardly be surprised considering the caliber of these fine lawyers before it. The Court also notes, after reviewing all of the evidence, that GISD's efforts appear geared toward revamping the education provided to its students. The Court applauds such efforts. In its efforts to do so, GISD should be given wide latitude to determine the appropriate course for its schools, and considerable deference to take actions that it believes are in the best interests of the children, especially given the challenging environment facing the financing of school districts today. Having said that, the Court will not stand for racial discrimination in GISD or any other school district. But, after reviewing all of the summary judgment evidence before the Court, the Court is convinced that although GISD's actions may have harmed relations amongst it and a few of its employees, those actions were not a result of unlawful racial discrimination. In conclusion, the Court holds that since Plaintiffs have failed to set forth specific facts showing that there is a genuine issue for trial with respect to either of their discriminatory compensation claims or Watkins's retaliation claim, Plaintiffs' claims against GISD are hereby **DISMISSED WITH PREJUDICE**. A final judgment reflecting this dismissal will be issued concurrently with this Order.

IT IS SO ORDERED.

APPENDIX C

VACANCY ANNOUNCEMENT

GALVESTON INDEPENDENT SCHOOL DISTRICT
An Equal Opportunity Employer

August 9, 2001

Position Title: Executive Director of Employee & Community Relations
Reports To: Superintendent
Location: Administration Building
Salary: $71,648 – 94,976 (Pay Grade 8)
Length of Work Year: 245 days

Position Summary:

The Executive Director of Employee and Community Relations will develop and implement comprehensive programs that will foster productive employees, enlightened parents, and successful community relations.

Position Requirements

Education/Certification:

Masters degree in educational administration, Texas mid-management, PDAS and ILT certification.

Experience:

At least five years experience in school administration

Special Knowledge/Skills:

Effective interpersonal skills.

Experience as a building level administrator.

Experience as a central office administrator.

Duties/Responsibilities:

Employee Relations:

1. Organize an Employee Relations Advisory Council to assess, plan, implement and evaluate programs, strategies and techniques to increase employee awareness of how to function successfully in the organization.

2. Provides guidance and counseling to district administrative and supervisory staff to mediate grievance action.

3. Represents the district in its relationships with employee groups to address issues and concerns.

4. Recommends new and revised employee relations policies.

5. Administers the district's grievance procedure.

6. Coordinates district "Grow Your Own" program for teachers and administrators.

Community Relations:

1. Organize a Community Advisory Council to assess, plan, implement and evaluate programs, strategies and technique to increase community involvement and awareness in achieving district goals.

2. Develops and implements an annual "community outreach plan" to facilitate strong communication, idea-sharing and trust-building with constituents throughout the Galveston Community. Facets of the plan may include building alliances with Chamber of Commerce, the

African American Chamber of Commerce, LULAC, and League of Women Voters etc.

3. Serves on and becomes involved with community committees and/or boards of trustees that have an interest in the school district, as assigned by the superintendent.

Parent Involvement:

1. Organize a Parent Teacher Advisory Council to assess, plan, implement and evaluate strategies and techniques to influence the academic achievement of students through parent participation.

2. Provides leadership and support for each campus Parental Teacher Organization in developing and implementing the campus parental involvement plan. This plan will be incorporated into the district improvement plan.

3. Develops programs and activities that will increase communication between parents, the schools and the district.

Supervisory Responsibilities:

Supervise and evaluate the performance of assigned personnel.

Working Conditions

Mental Demands:
Ability to communicate effectively (verbally and written); Interpret policy, procedures and maintain emotional control under stress.

Physical Demands/Environmental Factor
Frequent district wide travel and occasional statewide travel; occasional prolonged and irregular hours.

Application Procedures

District Employees:

Submit letter requesting transfer/reassignment by deadline.

Outside Applicants:

Send application to:
Galveston Independent School District
Human Resources
Terri L. Watkins
3904 Ave. T
Galveston, TX 77550
Phone: (409) 766-5121
Fax: (409) 766-5171
www.galveston-schools.org

Application Deadline:

Applications will be accepted until position is filled.

APPENDIX D

VACANCY ANNOUNCEMENT

GALVESTON INDEPENDENT SCHOOL DISTRICT
An Equal Opportunity Employer

August 9, 2001

Position Title: Executive Director of Human Resources
Reports To: Superintendent for Schools
Location: Administration Building
Salary: $71,648 – $94,977 (Admin. Pay Grade 8)
Length of Work Year: 245 days

Position Requirements:

Direct and manage district human resource activities to ensure legally sound and effective human resource management practices. Responsible for the development and implementation of human resource programs to include wage and salary administration, employee training, recruitment and staffing. Interpret and recommend personnel policies and regulations for the district.

Education/Certification:

Master's degree in educational administration
Texas mid-management or other appropriate Texas Certificates
Certified instructional supervisor and appraiser in Professional Development and Appraisal System (PDAS)

Experience:

Five years successful administrative experience or an equivalent amount of personnel experience in the private sector

Special Knowledge/Skills:

Knowledge of the selection, training, and supervision of personnel
Knowledge of wage and salary, benefits
Excellent communication and interpersonal skills
Ability to manage budget and personnel
Ability to interpret policy, procedures and data
Knowledge of school employment law and hearing procedures

Performance Responsibilities:

- Recruits, employs and maintains the highest caliber of staff possible to fill all positions in the organizational structure.
- Collaborates with business office to ensure a balanced and equitable compensation system which accurately reflects the requirements of each position.
- Directs the entire records management function of the district as it relates to current and former personnel, including: contract offers; contract renewals and non-renewals; criminal history reports; certification status; employee assignment and service records; employee salaries; and all other pertinent employee records information. Also manages the records of applicants to the school district.
- Provides and manages an appraisal system for the performance of all personnel.

- Prepares and implements a budget for the Human Resources Department.
- Recruits and trains high quality substitute teachers and manages the district's substitute teacher program.
- Prepares and implements long- and short-term plans to meet the projected human resources needs of the organization.
- Reviews, recommends and implements human resources policies, established by federal or state law, the State Board of Education rule or the local School Board, and stays current with human resources legislation.
- Coordinates the transfers of employees within the district.
- Coordinates all interview committees for the selection of professional and supervisory staff and presents professional candidates for superintendent/School Board approval.
- Assists administrative/supervisory staff in managing and/or resolving personnel issues.
- Oversees the placement and support of student teachers within the district.
- Ensures the training of all administrators in appropriate interviewing and hiring techniques for both professional and support personnel.
- Maintains alliances with other districts and the state organization to ensure sound, comprehensive human resources practices and policies.
- Performs other duties as assigned by the superintendent.

Working Conditions

Mental Demands

Ability to communicate effectively (verbal and written); interpret policy, procedures and data; coordinate district functions; maintain emotional control under stress.

Physical Demands/Environmental Factors

Frequent district-wide travel and occasional statewide travel; frequent prolonged and irregular hours.

Application Procedures

District Employees:

Submit letter requesting transfer/reassignment by deadline.

Outside Applicants:

Send application to:
Henry Boening
Superintendent
Galveston Independent School District
3904 Ave. T
Galveston, TX 77550
Phone: (409) 766-5121
Fax: (409) 766-5171
www.galveston-schools.org

Application Deadline:

Applications will be accepted until position is filled.

APPENDIX E

VACANCY ANNOUNCEMENT

GALVESTON INDEPENDENT SCHOOL DISTRICT
An Equal Opportunity Employer

August 9, 2001

Position Title: Chief Financial Officer
Reports To: Superintendent
Location: Administration Building
Salary: $71,648 – $94,976 (Admin. Pay Grade 8)
Length of Work Year: 245 days

Position Summary:

Direct and manage the operation of all financial and business affairs of the district including accounting, athletics programs, payroll, purchasing, child nutrition, facilities, transportation and printing services. Provide managerial direction and coordination under board policy guidelines to several key district functions. Serve as the chief financial advisor to the superintendent and board of trustees.

Position Requirements

Education/certification:

Masters degree in business related field or educational administration

Experience:

Five years experience in managing finance/accounting activities of a school district, or other governmental agency or business minimum of three years supervisory experience preferred.

Special Knowledge/Skills:

Advance technical knowledge of school finance, budgeting and accounting systems, and economics.
Ability to manage and coordinate diverse district functions through subordinate directors.
Working knowledge of data processing systems and financial applications.
Knowledge of Texas Education Agency Financial. Accountability System Resource Guide.

Duties/Responsibilities:
Instructional
Management

- Ensure that business operations are supportive of the instructional goals and objectives of the district and the attainment of the campus performance objective (academic excellence indicators).
- Develop long- and short-range objectives and goals for the business operations of the school district.
- Provide for effective two-way communications with staff, and board.
- Keep the superintendent informed on the business affairs of the district.
- Plan and conduct needs assessments for growth and improvement of the district business operations.
- Work with district personnel in projecting building and facilities need [sic], energy needs capital equipment needs, and other cost items for district and individual school improvements.
- Prepare, review and revise job descriptions in the business department.

- Develop training options and/or improvement plans to ensure the best operation in the area of business operations.
- Evaluate job performance of employees to ensure effectiveness.
- Make sound recommendations relative to personnel placement, transfers, etc. with in business department.
- Managers [sic] the district's real estate, property insurance, health insurance programs, and worker's compensation.
- Works directly with the architect and the school attorney in the preparation of bid advertisements for the construction of buildings and other types of construction, coordinating the preparation of contracts both for the construction of buildings and for the services of contractors as selected by bid for the maintenance items needed in the school district.
- Direct and manage business operations of the district including purchasing, food service, transportation, accounting, maintenance programs, construction management, tax collections, elections, budget hearings, bond issues debt management, investment programs, risk management employee benefits program and child nutrition services.
- Ensure that programs are [sic] cost-effective practices throughout the district.
- Compile district, campus, and program budgets and cost estimates based upon documented program needs.
- Implement the policies established by federal and state law, State Board of Education rule, and the

local board policy in the area of business operations.

- Compile, maintain, and file all reports, records, and other documents required.
- Maintains inventory of fixed assets.
- Represents the school district with school district's bank depository in securing adequate funds for operation of the district and in the investment of school district funds.
- Develop professional skills appropriate to job assignment.
- Prepares and conducts all elections.
- Articulate the district's mission to the community and solicit its support in realizing the mission.
- Interprets the financial concerns of the district to the community.
- Performs other duties as assigned by the superintendent.

Supervisory Responsibilities:

Supervise and evaluate the performance of assigned personnel; Director of Budget and Finance, Director of Athletics, Director of Child Nutrition, Director of Facilities, Director of Management Information Services, Director of Purchasing, and Director of Transportation.

Working Conditions

Mental Demands:
Ability to communicate effectively (verbally and written); Interpret policy, procedures and data; coordinate

district functions; maintain emotional control under stress.

Physical Demands/Environmental Factors

Frequent district wide travel and occasional state-wide travel; occasional prolonged and irregular hours.

Application Procedures

District Employees:

Submit letter requesting transfer/reassignment by deadline.

Outside Applicants:

Send application to:
Galveston Independent School District
Human Resources
Terri L. Watkins
3904 Ave. T
Galveston, TX 77550
Phone: (409) 766-5121
Fax: (409) 766-5171
www.galveston-schools.org

Application Deadline:

Applications will be accepted until position is filled.

APPENDIX F

VACANCY ANNOUNCEMENT

GALVESTON INDEPENDENT SCHOOL DISTRICT
An Equal Opportunity Employer

August 9, 2001

Position Title: Assistant Superintendent for Curriculum & Instruction
Reports To: Superintendent
Location: Administration Building
Salary: $71,648 – $94,976 (Admin Pay Grade 8)
Length of Work Year: 245 days

Position Summary:

Direct and supervise the instructional and curricular programs for the district.

Position Requirements

Education/Certification:

Master's degree in educational administration. Texas mid-management or other appropriate Texas certificates.

Experience:

Three years experience as a classroom teacher. (minimum)
Five years experience in campus administration. (minimum)

Special Knowledge/Skills:

Knowledge of curriculum and instruction.
Ability to evaluate instructional program and teaching effectiveness.

Ability to manage budget and personnel.
Strong communication, public relations, and interpersonal skills.

Duties/Responsibilities:
Instructional
Management

- Direct instructional and curriculum services to meet students' needs.
- Plan, implement, and evaluate instructional programs with teachers and principals, including learning objectives, instructional strategies, and assessment techniques.
- Apply research and district studies to improve the content, sequence, and outcomes of the teaching-learning process.
- Work with appropriate staff to develop, maintain, and revise curriculum documents based on systematic review and analysis.
- Involve instructional staff in evaluating and selecting instructional materials to meet student learning needs.
- Facilitate the use of technology in the teaching-learning process.
- Plan the necessary time, resources, and materials to support accomplishment of educational goals.
- Provide for two-way communication channel with principals, teachers, staff, parents, and community.
- Ensure that district goals and objectives are developed using a collaborative process and problem-solving technique with appropriate.

- Demonstrate skill in conflict resolution with administrators, parents, teachers, staff, and community.
- Participate in the district-level decision process to establish and review the district's goals and objectives and major classroom instructional programs of the district.
- Actively support the efforts of others to achieve district goals and objectives and the campus performance objective (academic excellence indicators).
- Obtain and use evaluative findings, including student achievement data, to examine curriculum/instructional program effectiveness.
- Assist, as appropriate, with the Professional Development and Appraisal System.
- Secure consultants, specialists, and other community resources for principals and supervised instructional staff to assist in attaining objectives.
- Provide effective staff development activities by using the mission of the district, program evaluation outcomes, and input from teachers and others.
- Prepare, review, and revise job descriptions in curriculum and instruction department.
- Evaluate job performance of employees to ensure effectiveness.
- Make recommendations relative to personnel placement, transfer, and retention, and dismissal.
- Implement the policies established by federal and state law, State Board of education rule, and the

local board policy in the area of curriculum and instruction.

- Ensure that programs are cost effective and funds are managed prudently.
- Compile budgets and cost estimates based upon documented program needs.
- Compile, maintain, and file all reports, records, and other documents required.
- Monitor professional research and disseminate ideas and information to other professionals.
- Develop needed professional skills appropriate to job assignments.
- Articulate the district's mission, instructional philosophy, and curriculum implementation strategies to the community and solicit their support in realizing the mission.
- Works with district personnel in projecting student environment and staffing needs.

Supervisory Responsibilities:

Supervise and evaluate the performance of instructional supervisors and support staff in the curriculum department.

Working Conditions

Mental Demands:
Ability to communicate effectively (verbal and written); interpret policy, procedures and data; coordinate district functions; maintain emotional control under stress.

Physical Demands/Environmental Factors
Frequent district wide travel and occasional statewide travel; occasional prolonged and irregular hours.

Application Procedures

District Employees:

Submit letter requesting transfer/reassignment by deadline.

Outside Applicants:

Send application to:
Galveston Independent School District
Human Resources
Terri L. Watkins
3904 Ave. T
Galveston, TX 77550
Phone: (409) 766-5121
Fax: (409) 766-5171
www.galveston-schools.org

Application Deadline:

Applications will be accepted until position is filled.

Supreme Court, U.S.
FILED
FEB 23 2004
OFFICE OF THE CLERK

No. 03-1060

In The Supreme Court of the United States

PATRICIA WILLIAMS, TERRI L. WATKINS,

Petitioners,

v.

GALVESTON INDEPENDENT SCHOOL DISTRICT,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GEORGE W. VIE III
Counsel of Record

MILLS SHIRLEY L.L.P.
400 Washington Building
2228 Mechanic Street
Galveston, Texas 77550
(409) 763-2341
FAX (409) 763-2879

Counsel for Respondent Galveston Independent School District

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	ii
Counter Statement of the Case	1
Factual Background	1
Lower Courts' Analysis	4
Reasons for Denying the Petition	5
1. The Fifth Circuit held Petitioners to the proper standard	7
2. There is no conflict as to the prima facie standard that demands review or correction	10
3. The outcome in this case would not be different	11
Conclusion	12

TABLE OF AUTHORITIES

Page

CASES

Buettner v. Eastern Arch Coal Sales Co., Inc., 216 F.3d 707 (8th Cir. 2000) 6

Corning Glass Works v. Brennan, 417 U.S. 188 (1974) 7

County of Washington v. Gunther, 452 U.S. 161 (1981) 7

Cullen v. Ind. Univ. Bd. of Trs., 338 F.3d 693 (7th Cir. 2003) 6, 9

Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978) 11

Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981) 5

Gunther v. County of Washington, 623 F.2d 1303 (9th Cir. 1979) 8, 9

Howard v. Lear Corp. Eeds & Interiors, 234 F.3d 1002 (7th Cir. 2000) 9

McKee v. Bi-State Dev. Agency, 801 F.2d 1014 (8th Cir. 1986) 6

Orahood v. Board of Tr. of Univ. of Arkansas, 645 F.2d 651 (8th Cir. 1981) 9

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70 (1955) 10

Scaria v. Rubin, 117 F.3d 652 (2d Cir. 1997) 11

Shultz v. Wheaton Glass Co., 421 F.2d 259 (3rd Cir. 1970) 6

Stanley v. University of Southern California, 13 F.3d 1313 (9th Cir. 1994) 9

TABLE OF AUTHORITIES – Continued

Page

Strag v. Board of Trustees, 55 F.3d 443 (4th Cir. 1995) 9

Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002) 10

Usery v. Columbia University, 568 F.2d 953 (2d Cir. 1977) 7

Uviedo v. Steves Sash & Door Co., 738 F.2d 1425 (5th Cir. 1984) 7

STATUTES

29 U.S.C. § 206(d)(1) 5

42 U.S.C. § 1981 ..... 4, 5, 6, 10

REGULATIONS

29 C.F.R. § 1620.27 8

BRIEF IN OPPOSITION

Respondent Galveston Independent School District ("GISD") accepts the description of Parties to the Proceeding, the Opinions Below, the Basis for Supreme Court Jurisdiction, and the Constitutional and Statutory Provisions Involved as stated by Petitioners in their Petition for a Writ of Certiorari.

GISD supplements the Statement of the Case in the following section.

COUNTERSTATEMENT OF THE CASE

Factual Background

A number of Galveston Independent School District administrators are placed on an "Exempt and Administrative Pay Schedule." These administrators are classified in various pay grades, with the highest level being pay grade 8. There were four employees in that pay grade.

The Texas comptroller's office implemented an audit program to recommend ways in which Texas school districts could save money and improve their performance in educating students. GISD participated in the new program. After the audit, the comptroller's report recommended the elimination of certain GISD positions, and the creation of others. The comptroller's report also concluded that GISD was not paying its employees at market rates. The report therefore recommended the school district implement a program to raise salaries to market rates, with priority to those positions most below the market.

The school district's superintendent determined that a study of current administrator's salaries was needed in

order to determine how to bring GISD's administrative salaries to market level. After review of a salary study, administrators in pay grade 8 received market adjustments and cost of living adjustments to their salaries, or only cost of living adjustments only if their salaries were already at market. As a result of this "market adjustment" process, there were salary differences among the four grade 8 employees.

Dr. Williams and Ms. Watkins are both directors with GISD and in pay grade 8. The other two grade 8 employees are the chief financial officer, responsible for all financial functions and non-instructional functions, and the assistant superintendent for curriculum and instruction, responsible for all instructional areas. Dr. Williams and Ms. Watkins claim the salary differences between themselves and the two other grade 8 employees are motivated by race.

Dr. Williams is the executive director of employee and community relations. She handles employee relations, including grievances. Dr. Williams has one person, her secretary, who reports directly to her. The budget for her department was $118,312.

Ms. Watkins is the executive director of human resources. Ms. Watkins' primary responsibility is the recruitment and hiring of teachers, certified personnel, teacher's aides, and other instructional-related positions. Ms. Watkins has five employees who report directly to her. The human resource department budget was $287,802.

Paul McLarty, a white male, was the chief financial officer. Mr. McLarty was responsible for the GISD budget of some $54 million in the general fund, plus special funds of some $13 million. As chief financial officer, Mr. McLarty

oversaw the maintenance and operations, transportation, food service, athletics, purchasing, and finance departments, which have some 350 employees. The chief financial officer also manages GISD's real property and is responsible for conducting district elections. Mr. McLarty had six directors that reported directly to him.

The other pay grade 8 employee, E. J. Garcia, was assistant superintendent for curriculum and instruction. Ms. Garcia, a white female, was responsible for all of the educational programs in the district. She also provided and implemented instructional programs with teachers and principals, developed curriculum, and provided teacher professional development. Eight directors, five teaching assistants, and a grant's writer reported directly to Ms. Garcia. In addition to these responsibilities, Ms. Garcia assisted the superintendent with supervision of all principals and assistant principals and accepted the responsibilities of the superintendent when the superintendent was away from GISD. Ms. Garcia oversaw a budget in excess of some $13 million in local, state, federal and grant money. Many of her responsibilities were related to requirements imposed on the district by state and federal education laws, including testing related to the Texas accountability system, bilingual and special education, and state-mandated curriculum.

To support her claim of unequal pay, Dr. Williams compared her responsibilities to those of Ms. Garcia and Mr. McLarty. Ms. Watkins compared her responsibilities to those of Mr. McLarty only.

Dr. Williams agreed that the job descriptions for her job, and that of Mr. McLarty or Ms. Garcia, were "different." Dr. Williams also agreed that she did not supervise

the number of people or departments that Mr. McLarty and Ms. Garcia did, and she acknowledged the budgets were not comparable.

Ms. Watkins, too, admitted the "design of the organization" was such that she did not have a similar level of supervision and responsibility as the chief financial officer position. Watkins conceded her job and the job of assistant superintendant of curriculum had different duties, different responsibilities, and different levels of supervision.

Lower Courts' Analysis

Dr. Williams filed suit against the GISD based on the Civil Rights Act of 1866, 42 U.S.C. § 1981. Ms. Watkins later joined the litigation as plaintiff. Thereafter GISD moved for summary judgment, contending that Dr. Williams and Ms. Watkins could not prove a prima facie case of racial discrimination under section 1981 as to any salary differences.

The district court granted summary judgment, holding Dr. Williams and Ms. Watkins could not make a prima facie case of discriminatory compensation because their positions were not substantially similar in responsibilities to either of the other two employees in pay grade 8. Additionally, even though plaintiffs did not make out a prima facie case, the court concluded GISD's reasons for the salary differences were legitimate, nondiscriminatory, and not pretextual. Specifically, the court found that the school district had made salary adjustments to the pay grade 8 employees in response to recommendations of the Texas comptroller, and guided by the salary study. (Pet. App. 23, 26).

The Fifth Circuit Court of Appeals affirmed the summary judgment. The court determined the relevant job descriptions demonstrated that the four grade 8 positions differ in many respects. The court of appeals held that not only were job responsibilities dissimilar in substance, but the scope of their authority over funds and employees differed. The court held the job differences "fatally undercut" Dr. Williams and Ms. Watkins' claims for discriminatory compensation. (Pet. App. 7).

REASONS FOR DENYING THE PETITION

The elements of a prima facie case of employment discrimination alleging disparate treatment under Title VII and 42 U.S.C. § 1981 are identical. Therefore, facts that preclude relief under Title VII also preclude a Section 1981 claim. *Garcia v. Gloor*, 618 F.2d 264, 271 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981).

The Equal Pay Act provides, in relevant part:

> No employer having employees subject to any of the provisions of this section shall discriminate . . . between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment . . . except where such payment is made pursuant to . . . a differential based on any other factor other than sex.

29 U.S.C. § 206(d)(1).

Dr. Williams and Ms. Watkins contend the court of appeals erred in holding them to an "equal work" standard of the Equal Pay Act. *See* Petition at 9. But as set out in

their brief to the court of appeals, Dr. Williams and Ms. Watkins contended that one issue before the appellate court was "what weight to be given to evidence in determining if Appellants have shown discriminatory compensation as compared to a similarly situated employee who performs work requiring substantially the same responsibility." Appellants' Brief at 2. Dr. Williams and Ms. Watkins also asserted that the district court had erred "in not equating the job responsibilities of Dr. Williams and Ms. Watkins as being on par with that of Ms. Garcia and Mr. McLarty; i.e. [sic] work requiring substantially the same responsibility." Appellants' Brief at 18. This case, therefore, is a classic case of alleged unequal pay for equal work.

Thus, while Dr. Williams and Ms. Watkins brought this case as a Section 1981 claim, the Equal Pay Act framed it. It is well settled among the lower courts that the standards of the Equal Pay Act are applicable to charges of sex or race based discrimination in compensation under Title VII and section 1981. *Cullen v. Ind. Univ. Bd. of Trs.*, 338 F.3d 693 (7th Cir. 2003); *Buettner v. Eastern Arch Coal Sales Co., Inc.*, 216 F.3d 707, 718-19 (8th Cir. 2000); *Shultz v. Wheaton Glass Co.*, 421 F.2d 259 (3rd Cir. 1970). Thus in *McKee v. Bi-State Dev. Agency*, 801 F.2d 1014 (8th Cir. 1986), the court stated that "where a claim is for unequal pay for equal work based upon sex, the standards of the Equal Pay Act apply whether the suit alleges a violation of the Equal Pay Act or Title VII." *Id.* at 1019.

The court of appeals' decision below rests on a proper application of this law and does not conflict with any decision of this Court or any other court of appeals. Review is therefore not warranted.

1. The Fifth Circuit held Petitioners to the proper standard

To establish a prima facie case of pay discrimination under Title VII, the court of appeals held Dr. Williams and Ms. Watkins to the following showing: (1) they were members of a protected class, and (2) they were paid less than a nonmember for work that required substantially the same responsibility. *Uviedo v. Steves Sash & Door Co.*, 738 F.2d 1425, 1431 (5th Cir. 1984). This standard is not materially different from the Equal Pay Act standard.

Corning Glass Works v. Brennan, 417 U.S. 188 (1974) is the leading case interpreting the Equal Pay Act. The Court stated that a prima facie case under the act is established if the plaintiff can show: (1) that an employer is paying different wages to employees of the opposite sex; (2) that the employees are performing jobs which require equal skill, effort, and responsibility; and (3) that the employees have similar working conditions. *Id.* at 190.

The Equal Pay Act only requires that a plaintiff demonstrate that two jobs are "substantially equal" as to the requisite skill, effort, and responsibility. *Usery v. Columbia University*, 568 F.2d 953, 958 (2d Cir. 1977).

Both lower courts held that the summary judgment evidence did not establish the second element of a prima facie claim, since Dr. Williams and Ms. Watkins' positions were not substantially similar to the other two employees. This was not an inappropriate application of the Equal Pay Act to this section 1981 case, but a proper one.

Dr. Williams and Ms. Watkins claim this analysis "runs afoul" of *County of Washington v. Gunther*, 452 U.S. 161 (1981). Petition at 8. Nothing in that decision changes

the result or analysis here. In *Gunther* the Court held that the Bennett Amendment to Title VII, which prohibits sex-based wage discrimination claims where the pay differential in question is authorized by the Equal Pay Act, effectively incorporates into Title VII the Equal Pay Act's affirmative defenses.

Gunther also teaches that Title VII covers types of wage discrimination not actionable under the Equal Pay Act, including disparate impact claims. Thus, "even absent a showing of equal work, there is a cause of action under Title VII when there is direct evidence that an employer intentionally depressed a woman's salary because she is a woman." *Id.* at 204 (Rehnquist, J., dissenting). "Therefore, an act or practice of an employer or labor organization that is not a violation of the EPA may nevertheless be a violation of title VII." 29 C.F.R. § 1620.27.

In fact the issue raised by Petitioners is answered by the Court's affirmance of the Ninth Circuit in *Gunther*. There the court of appeals held that "a plaintiff is not precluded from establishing sex-based wage discrimination under some other theory [than substantial equality] compatible with Title VII." *Gunther*, 623 F.2d 1303, 1321 (9th Cir. 1979). This case, however, was not about "wage discrimination under some other theory than substantial equality." *Id.* Dr. Williams and Ms. Watkins alleged that they were paid less than two similarly situated employees. The district court held that Dr. Williams and Ms. Watkins did not show that their positions were substantially similar to those two positions. (Pet. App. 16-20). And the court of appeals held that Dr. Williams and Ms. Watkins' positions, and the positions of Mr. McLarty and Ms. Garcia, were "too dissimilar to facilitate comparison." (Pet. App. 8).

The Fifth Circuit held that "[if] a plaintiff's job responsibilities are significantly different from the responsibilities of employees she cites as a point of comparison, then the plaintiff has not made out a prima facie case." The court added that in considering whether two jobs require substantially the same responsibility, it looks at the jobs' duties, "including the jobs' relative supervisory authority and responsibility for revenue." (Pet. App. 6). This analysis was consistent with *Gunther*, and with later cases in other courts of appeals. Thus the court in *Cullen v. Ind. Univ. Bd. of Trs.*, 338 F.3d 693 (7th Cir. 2003) held that evidence dispositive of an Equal Pay Act claim was also dispositive of a Title VII claim. *Id.* at 703.

The factors the courts below considered were appropriate. The court in *Cullen* held that management of a department twice the size of another was "indicative of greater responsibility." *Id.* at 700. In *Howard v. Lear Corp. Eeds & Interiors*, 234 F.3d 1002, 1005 (7th Cir. 2000) the court observed the "additional skill, effort, and headache involved in managing three to six times the number of workers in a more complex employment environment" made positions substantially different. Likewise, in *Orahood v. Board of Tr. of Univ. of Arkansas*, 645 F.2d 651, 655 (8th Cir. 1981) the court of appeals affirmed a finding of not substantially similar positions because a male employee supervised a much larger department with more employees. In *Strag v. Board of Trustees*, 55 F.3d 443 (4th Cir. 1995) the court rejected a comparison between a female mathematics teacher and a male biology teacher because the mathematics and biology departments required different skills and responsibilities. And in *Stanley v. University of Southern California*, 13 F.3d 1313 (9th Cir. 1994) the court held the jobs of male and female basketball

coaches could not be compared as "substantially equal" because the male coach had more responsibilities, more experience, and more experience in public relations.

The Equal Pay Act requires only "substantially" equal work. This standard does not materially differ from the prima facie case under Title VII considering "work that required substantially the same responsibility." The court of appeals therefore did not err in its prima facie analysis.

2. There is no conflict as to the prima facie standard that demands review or correction

In their second question presented, Dr. Williams and Ms. Watkins contend there is no definitive standard in the wage discrimination context, leading to inconsistent and unjust results. Petition at 14.

Whether there is a "definitive standard," the application in the lower courts of the Equal Pay Act standards to Title VII and section 1981 is not in tension.

This Court has stated that certiorari should not be granted "except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 79 (1955). The decisions Dr. Williams and Ms. Watkins cite do not establish a real and unjust conflict among the courts as to the prima facie standard. Moreover, this Court has explained that the "precise requirements of a prima facie case can vary depending on the context and were 'never intended to be rigid, mechanized, or ritualistic.'" *Swierkiewicz v.*

Sorema N.A., 534 U.S. 506 (2002), citing *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978).

3. The outcome in this case would not be different

Review is also not warranted because a refinement of the prima facie case would have made no difference in the outcome. Even if Dr. Williams and Ms. Watkins had prevailed in establishing a prima facie case, the district court nevertheless concluded that GISD had established a nondiscriminatory, not pretextual reason for the pay differences. (Pet. App. 26-27).

In making the determination to increase the salaries of some in pay grade 8 GISD relied on a third party's independent audit and the conclusions that followed from that review. In determining the amounts of the salary increases, GISD relied on market value and market studies. The discrimination laws do not interfere with business decisions such as these. *E.g.*, *Scaria v. Rubin*, 117 F.3d 652, 655 (2d Cir. 1997) (per curiam) (federal courts hearing discrimination claims do not "sit as a super-personnel department").

CONCLUSION

Respondent Galveston Independent School District prays that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

GEORGE W. VIE III
Counsel of Record

MILLS SHIRLEY L.L.P.
400 Washington Building
2228 Mechanic Street
Galveston, Texas 77550
(409) 763-2341
FAX (409) 763-2879

Counsel for Respondent Galveston Independent School District